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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 703(e)	)	
of the Telecommunications Act	)	
of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules	)	
and Policies Governing Pole	)	
Attachments	)	

MCI COMMENTS

September 26, 1997

Summary

In its Notice in this proceeding, the Commission seeks comment on the implementation of a methodology to ensure just, reasonable, and nondiscriminatory maximum pole attachment and conduit rates for carriers providing telecommunications services. MCI supports the Commission's proposal to apply its current dispute resolution procedures, provided the Commission establishes a fundamentally similar, clear, cost-based formula for setting maximum pole, conduit, and transmission rates for telecommunications attachments.

MCI supports the Commission's conclusion that overlashing is technically feasible. In CS Docket 97-98, MCI argued that overlashing expands the usable space on poles, permitting multiple attachments on even 30 foot poles. Moreover, MCI supports the aspects of the Heritage Decision that determine it is not reasonable for the pole owner to limit, prohibit, or demand to approve an attahers' leasing of dark fibers from its attachments. However, MCI opposes what would amount to preferential rate treatment for cable companies if the rate treatments discussed in the Heritage Decision were to remain operative.

The Commission is not required to authorize the lease of unused fiber capacity available on legitimate telecommunications attachments, whether the capacity is located on the original line or on the line overlashing the original line. The Pole Attachment Act is limited to setting equitable rates, terms, and conditions for gaining access to poles. Since a third party may acquire access to a fiber strand at a location owned by the party offering excess fiber capacity for lease, the effect of leasing excess fiber capacity will have no impact on pole attachments per se.

The only equitable approach is to increase the presumptive pole height by the amount of

additional usable space made possible by overlashing. MCI recommends the Commission adopt a presumptive amount of two, 1 inch overlashings per attachment, on a presumptive base of 4, non-supply attachments; yielding a presumptive total 12 attachments sharing the cost of usable non-electric pole space.

Permitting third parties to overlash existing attachments will create two difficulties. First, such an attachment may impose additional costs on the attached party in the event the attached party rearranges its attachment(s). The Commission should determine that third party overlashers are liable for make-ready charges associated with any delashing that may be needed when the original cable needs to be replaced or repaired. Second, while overlashings are technically feasible, they do increase the risk the original cable will break, more so in the case of coaxial cable as discussed above. The Commission should therefore determine that third party overlashers are liable for damages in the event overlashing causes cable breakage.

MCI urges the Commission to expand the presumptive amount of usable space by the extent of feasible overlashing, as discussed immediately above. Doing so will share the benefits of overlashing equitably among providers of cable and telecommunications services. It will avoid the mirror pitfalls of over-recovering pole costs as proposed by the electric utilities, and encouraging speculative investment as proposed by NCTA. MCI's proposed method will reduce the cost of attachments for cable and telecommunications attachments alike, and thereby encourage cable systems to upgrade their cable services, and expand into data and internet services. At the same time non-cable telecommunications carriers will not be placed at a competitive disadvantage expanding their telephony, data and internet service offerings. MCI's proposal is competitively neutral and will most efficiently promote varied and advanced service development.

Congress intended §224(e) to apply to all attachments providing telecommunications services, and §224(d) to apply to attachments providing only cable services. Consequently, only attachments that provide telecommunications services should be counted for purposes of allocating two-thirds of non-usable space costs. This means that attachments owned by cable operators will be subject to §224(e) rate treatment if the attachment provides a telecommunications service. Attachments owned by an electric utility, or its affiliate, will be subject to §224(e) rate treatment if any part of the attachment provides a telecommunications service. Similarly each incumbent LEC attachment should be counted when determining the allocation of two-thirds of the non-usable costs.

New telecommunications entrants face a supply of distribution poles and conduits that are controlled by two or three sources. While incumbent utility companies do own their own rights of way, or obtain easements to the privately owned rights of way of non-utilities, it is not clear that incumbent utilities are in a position to exercise market power with regard to private rights of way generally. Consequently, MCI does not believe the Commission must adopt rules establishing a generally applicable rate methodology for attachments to private rights-of-way.

MCI has experienced difficulty in one area of gaining access to private rights-of-way. Very often an incumbent utility has gained an easement to a non-utility private right of way. When MCI or other new entrants approach the utility company to share this easement, we are told at times that the utility does not have the authority to share this easement with MCI. The Commission should affirm its decision in CC Docket 96-98 requiring utility companies to exercise their rights of eminent domain to expand an existing right-of-way over private property to cable companies and non-incumbent telecommunications carriers.

In its Notice, the Commission seeks comment on its proposal to phase in any rate increases that might result from telecommunications carriers moving from rates based on §224(d) to rates based on §224(e), equally over a 5 year period, beginning February 8, 2001.[1] MCI recommends the Commission clarify that the 5 year phase-in pertains to any rate increase resulting from the absorption of non-usable costs by telecommunications carriers. The phase-in would apply whether a telecommunications company had already negotiated interim rates pursuant to §224(d), or whether a telecommunications company was negotiating for a first-time attachment pursuant to §224(e).

MCI also requests the Commission to affirm that Congress intended only rate increases to be phased in over time. Congress was concerned that the effect of moving to a permanent rate regulation regime for telecommunications carriers not subject their business plans to immediate, negative harm. Consequently, Congress did not require rate changes to be phased in. Rate reductions that may occur should be immediately implemented.

[1] *Notice* at 17.

I. Introduction

The 1996 Act requires the Commission to prescribe pole attachment regulations that govern pole attachment charges for carriers that provide telecommunications services within two years from enactment, with these rules becoming effective April 2001, five years from enactment.[2] Until then, §224(d)(3) of the 1996 Act applies the Commission's existing pole attachment methodology to both cable television systems and telecommunications carriers that do not have existing pole attachment agreements in place.[3]

In its Notice in the above-captioned proceeding, the Commission seeks comment on the implementation of a methodology to ensure just, reasonable, and nondiscriminatory maximum pole attachment and conduit rates for carriers providing telecommunications services.[4] The Commission seeks comment on the following issue areas:

- whether to apply its existing complaint procedures, rules, and formulas to carriers providing telecommunications service;
- how to treat the issue of usable space for telecommunications attachments;
- how to treat the issue of non-usable space for telecommunications attachments;
- how to treat the issue of access to private rights of way; and
- how to treat the transition to the permanent rate methodology for telecommunications attachments.

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[2] 47 U.S.C. § 224(e)(1) - (4).

[3] 47 U.S.C. § 224(d)(3).

[4] Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, *Notice*, CS Docket No. 97-151, Released August 12, 1997.

II. Current Dispute Mechanisms Should Be Continued

In its Notice, the Commission proposed applying its rules for bringing complaints that cable companies may have about pole attachment charges to complaints telecommunications companies may have about pole attachment charges.[5] The Commission's current rules require an attacher to attempt to resolve its dispute before filing a complaint, and then briefly summarize the steps it has taken to resolve disputes as part of its complaint.[6] The Commission's current complaint procedures are premised on the existence of a simple pole attachment formula for calculating maximum attachment rates, publically available account data, and clear decisions regarding which accounts may be recovered through that formula. The existence of a clear, easy-to-compute formula for maximum rates has been a necessary condition for making negotiations, and industry resolution of disputes, possible. MCI supports the Commission's proposal to apply its current dispute resolution procedures, provided the Commission establishes a fundamentally similar, clear, cost-based formula for setting maximum pole, conduit, and transmission rates for telecommunications attachments.

III. Charges For Usable Space Must Be Competitively Neutral

A. Cable Company Attachments Must Now Be Distinguished According to Whether They Are Used To Provide Cable or Telecommunications Services

In 1991, the Commission determined that the Pole Attachment Act of 1978 prohibited utility companies from imposing a separate, non-cost-based, charge for attachments made by cable companies that are used to provide telephony or data services. The Commission reasoned that

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[5] *Notice* at 7.

[6] 47 C.F.R. §1.1404(i).

since §224 did not limit the nature of services a cable operator may provide, "...a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles."[7]

The Commission seeks comment on whether this 1991 'Heritage Decision' "...should be extended to other circumstances where utilities attempt to condition or limit the use of attachment space."[8] The rationale under which cable operators had obtained cable rate attachments for facilities intended for data and telephony services rested on the absence of any legislative history distinguishing telecommunications from cable services offered by a cable system operator. However, new §224(d)(3) and §224(e)(1) explicitly distinguish cable services from telecommunications services, even if both are offered by a cable television system. New §224(d)(3) limits §224(d)(1) cost treatment *solely* to cable attachments providing cable-only services. Congress has explicitly determined that if a cable attachment carries non-cable signals, that attachment must be treated as a telecommunications attachment.[9] A cable operator (or any carrier) offering telecommunications services will be subject to the rate treatment the Commission implements in response to §224(e) of the 1996 Act. Until §224(e) rate treatments become effective in 2001, §224(d)(3) grandfathers existing pole attachment contracts, and permits new telecommunications attachments to obtain §224(d)(1) treatment.

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[7]Heritage Cablevision Association of Dallas, L.P. v. Texas Utilities Electric Company, *Heritage Decision*, 6 FCC Rcd., 7099 (1991).

[8]*Notice* at 7.

[9]§224(d)(3) clearly limits cable treatment to facilities that are dedicated to the provision of cable services. "This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable services."

Congress clearly stated that carriers using facilities providing telecommunications services would be among those responsible for recovering two-thirds of the cost of non-usable pole space, in contrast to carriers using facilities exclusively providing cable services who would be free of this responsibility.[10] By explicitly basing cost treatment for an attachment on the type of service provided over that attachment, Congress intended the Commission's pole attachment rates to favor cable services, not cable operators. Therefore, the Commission must develop pole attachment policies that do not favor cable operators who provide telecommunications services over other providers of telecommunications services. MCI's comments will show that the Commission's proposals consistently discriminate in favor of the facilities cable operators would use to provide telecommunications services.

B. Extending the Commission's Heritage Decision to Telecommunications Carriers Would Establish Preferential Attachment Rates for Cable Telecommunications Services

In its Notice, the Commission tentatively concluded that "...telecommunications carriers should be permitted to overlash their existing lines with additional fiber when building out their system."[11] MCI supports the Commission's conclusion that overlashing is technically feasible. In CS Docket 97-98, MCI argued that overlashing expands the usable space on poles, permitting multiple attachments on even 30 foot poles.[12] Moreover, MCI supports the aspects of the

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[10]§224(e)(2) states that "[a] utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the cost of providing space other than the usable space that would be allocated to such entity under equal apportionment of such costs among all attaching entities."

[11]*Notice* at 8.

[12]*See, MCI Comments*, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No 97-98, at 13.

Heritage Decision that determine it is not reasonable for the pole owner to limit, prohibit, or demand to approve an attahers' leasing of dark fibers from its attachments.

However, MCI opposes what would amount to preferential rate treatment for cable companies if the rate treatments discussed in the Heritage Decision were to remain operative. In the Heritage Decision, the Commisson determined that overlashed cable would be charged at the same rate as the original attachment.[13] If cable companies overlash their existing cable attachments with telecommunications attachments, they will be charged at rates that do not include recovery of other-than-usable space costs. These costs are significant. The Commission's proposal to extend the Heritage Decision will result in unduly discriminatory rates for telecommunications attachments, and must be rejected.

C. Permitting the Lease of Dark Fiber or Excess Capacity to Third Parties Will Not Resolve the Inequities Arising from Attachment Rates that Discriminate in Favor of Cable Providers of Telecommunications Services

The Commission recognizes that extending its Heritage Decision will permit attachment rates that discriminate in favor of cable providers of telecommunications services, and incent cable operators to overlash a far greater amount of fiber than they will be able to use. This amounts to a reservation of limited overlashing capacity available on a pole. To remedy this situation, the Commission proposes permitting cable companies to lease the unused fiber capacity on either the original or overlashed cables to third parties.[14]

MCI does not believe the Commission has to authorize the lease of unused fiber capacity available on legitimate telecommunications attachments, whether the capacity is located on the

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[13] *Heritage Decision*, at 7105.

[14] *Notice* at 8.

original line or on the line overlashing the original line. The Pole Attachment Act is limited to setting equitable rates, terms, and conditions for gaining access to poles. Since a third party may acquire access to a fiber strand at a location owned by the party offering excess fiber capacity for lease, the effect of leasing excess fiber capacity will have no impact on pole attachments per se.

However, unless the party with excess fiber is subject to cost-based regulation as a common carrier, it will be permitted to negotiate market rates for the lease of its dark fiber. This will certainly be the case for cable companies that overlash excess fiber capacity on their coaxial cable. These rates will be at least as high as the attachment rate that would be set for telecommunications carriers. Thus, because dark fiber or excess capacity lease rates will not be regulated, cable companies will be able to fully capture the difference between the cable and telecommunications attachment rates, and will not be under any market or regulatory pressure to share their preferential treatment with other telecommunications carriers. Permitting the leasing of excess capacity will not redress the inequities that will arise from continuing to apply the pricing aspects of the Heritage Decision to cable company telecommunications attachments.

D. The Technical Feasibility of Overlashing Requires An Increase in Usable Pole Space Presumptions

The record in the companion proceeding on pole attachments strongly supports the conclusion that overlashing an existing line is regularly permitted, and technically feasible. In that proceeding, MCI argued that overlashing *expands the usable space* on poles, permitting multiple attachments on even 30 foot poles.[15] This is the proper way to account for overlashing, because it shares the value of the extra space created by overlashing with all attaching parties.

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[15]See MCI Comments, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No 97-98, at 13.

In its Notice, the Commission proposes to let parties overlash either their own or other party's lines. MCI supports both options, and will discuss them further below. However, the Commission does not explicitly address the rate overlashings are to be charged. Applying the logic of the Commission's Heritage Decision would result in overlashings being charged the same rate as original attachments. If rates for existing (non-overlashed) attachments permit full recovery, then charging the same rates to overlashings will permit pole owners to over-recover their pole costs. Consequently, this option must be rejected.

In their Reply Comments in the companion pole attachment proceeding, NCTA proposed letting existing attachers overlash their own lines at no charge.[16] They argue that since the overlashing does not occupy additional pole space, and since the Commission sets pole attachment rates according to space occupied, overlashing attachments should be permitted at no charge. This option must also be rejected because it unfairly favors existing attachments. At a zero overlashing charge, parties with existing attachments will have a strong incentive to overlash in excess of any demand they perceive for their own services as a means of monopolizing limited overlashing capacity. The Commission's suggestion that those who overlash may permit others to use the overlashed facility does not solve the rate discrimination problem.[17] The overlasher will charge a rate up to the rate for a new telecommunications' attachment, reap the full value of the extra space created by the overlashing, and share none with other parties.

Neither does the option of permitting a third party to overlash an existing attachment

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[16]NCTA Reply Comments, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, August 11, 1997, at 42.

[17]"If a telecommunications carrier is allowed to overlash its own lines, should it be permitted to allow third parties to use the overlashed facility?" *Notice* at 8.

eliminate discrimination. At best, it delays discrimination.[18] If overlashing is made available to third parties at zero rates, the Commission will unleash an avalanche of speculative investment. Fiber will be overlashed on every cable and telecommunications attachment, completely filling up overlashing capacity. Investors will simply sit back and wait for demand to materialize. They will lease capacity at market rates, and yield a very tidy monopoly profit.[19]

The only equitable approach is to increase the presumptive pole height by the amount of additional usable space made possible by overlashing. The Commission's existing rules presume pole height is 37.5 feet; usable space is 13.5 feet; and other-than-usable space is 24 feet. Electric companies typically take as much as 7 feet, including the 3.3 feet needed for safety space. This leaves 6.5 feet of usable space for cable and telecommunications purposes. Each telecommunications attachment requires one foot of clearance between each through-bolt hole used for the attachment, so six non-electric attachments are possible.[20]

Overlashing can greatly expand the number of attachments, effectively expanding usable space. The only notable stress an overlash places on a pole is due to lateral wind loads, which are a function of the diameter of the overlashed cable. Each attachment can support overlashings up to 3 inches in diameter without adding stress to the pole. This could permit two-to-three 1-1.5 inch fiber cables to be overlashed. If attachments are permitted on both sides of the pole using the

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[18]"We inquire whether a third party should be permitted to overlash to an existing cable system or telecommunications carriers' attachment." *Notice* at 8.

[19]The investors most likely to benefit from this speculation will be cable, LEC and electric incumbents, who in addition to raising investment capital for overlashings from shareholders are also able to increase rates to their core customers, and further reduce shareholder risk.

[20]Outside Plant Engineer's Handbook, Section 1, Page 7.

same through-bolt, it would be possible to overlash four-to-six 1-1.5 inch fiber cables.

MCI recommends the Commission adopt a presumptive amount of two, 1 inch overlashings per attachment, on a presumptive base of 4, non-supply attachments; yielding a presumptive total 12 attachments sharing the cost of usable non-electric pole space. As discussed above, overlashings permit a maximum amount of 6 additional overlashings for every original attachment. If the maximum number of non-overlashed attachments is 6, then the maximum number of overlashings is 36, and the maximum number of total attachments is actually 42 .

In practice there may be fewer than 6 non-electric attachments per pole, and fewer than 6 overlashings per original attachment. At a minimum, the Commission should presume there will be 4 non-overlashed attachments: one cable, one ILEC, one independent CLEC, and one LEC affiliated with the incumbent electric company. MCI further recommends a presumptive number of 2 overlashings per original attachment as a very conservative estimate of the number of overlashings.

Table 1 shows how overlashing will effect existing usable space presumptions of one foot per attachment and 6.5 feet of usable communications/cable space. If there are 4 non-electric attachments, and 2 overlashings per original attachment, the same 6.5 feet of space can presumptively accomodate 12 attachments. Usable non-electric space would effectively increase from 6.5 feet to 12.5 feet; pole height will increase from 37.5 feet to 43.5 feet; the share of usable space recovered per coaxial cable attachment will decrease from 7.4% to 1.6%; and the share of usable space recovered per telecommunications attachment will decrease from 13.6% to 5.6%.[21]

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[21]Calculations assume that cable coax supports 2 telecommunications overlashings; 3 telecommunications attachments each support 2 overlashings, yielding 11 telecommunications attachments and one cable attachment on the pole. The one foot of space originally allocated to

Under this method, all attaching parties will share in the benefits of expanded usable space made possible by overlashings, even if a party does not overlash. Telecommunications attachments will be charged the same rate whether or not they are overlashed, removing the incentive for speculative overinvestment in overlashing facilities.[22]

Table 1
Effect of Overlashing on Usable Space Presumptions

	Existing Presumptions	**Adjusted Presumptions**
Pole Height	**37.5**	**43.0**
Usable Space	**13.5**	**19.0**
- Allocated to Electric	*7.0*	*7.0*
- Allocated to Cable	*1.0*	*.3*
- Allocated to Telecommunications	*5.5*	*11.7*
Other-than-Usable Space	**24.0**	**24.0**
Share of usable space per cable attachment	**7.4%**	**1.6%**
Share of usable space per telecommunications attachment	**13.6%**	**5.6%**

cable is now shared with two telecommunications attachments, so cable has been allocated 1/3 of usable non-electric space.

[22]It is appropriate for telecommunications attachments to benefit to a greater extent than cable attachments since these reductions will be offset by additional charges to recover a share of the costs of other-than-usable space.

E. Mechanics of Overlashing

In its Notice, the Commission asks "...whether there are inherent differences between the lines of cable systems and those of telecommunications carriers that warrant a difference in treatment between overlashing by cable systems and telecommunications carriers."[23] Coaxial and fiber cable are all typically an inch or less in diameter. However, the covering of coaxial cable is less resistant to stress than fiber cables. At times, coaxial cable is strung without a guy wire or support strand, also making it more vulnerable to breakage in the process of overlashing. In spite of the greater likelihood coaxial cable may break, overlashing is often done on coaxial cable.

Permitting third parties to overlash existing attachments will create two difficulties. First, such an attachment may impose additional costs on the attached party in the event the attached party rearranges its attachment(s). The Commission should determine that third party overlashers are liable for make-ready charges associated with any delashing that may be needed when the original cable needs to be replaced or repaired. Second, while overlashings are technically feasible, they do increase the risk the original cable will break, more so in the case of coaxial cable as discussed above. The Commission should therefore determine that third party overlashers are liable for damages in the event overlashing causes cable breakage.

MCI urges the Commission to expand the presumptive amount of usable space by the extent of feasible overlashing, as discussed immediately above. Doing so will share the benefits of overlashing equitably among providers of cable and telecommunications services. It will avoid the mirror pitfalls of over-recovering pole costs as proposed by the electric utilities, and encouraging

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[23] *Notice* at 8.

speculative investment as proposed by NCTA. MCI's proposed method will reduce the cost of attachments for cable and telecommunications attachments alike, and thereby encourage cable systems to upgrade their cable services, and expand into data and internet services. At the same time non-cable telecommunications carriers will not be placed at a competitive disadvantage expanding their telephony, data and internet service offerings. MCI's proposal is competitively neutral and will most efficiently promote varied and advanced service development.

IV. Charges For Other-than-usable Space Must Be Competitively Neutral

A. Cost of Other-than-usable Pole Space Should Be Allocated According to Number of Attachments Rather than According to Number of Entities

In its Notice, the Commission proposes to allocate the cost of other-than-usable pole space equally among each attaching entity, apparently without regard to the number of attachments held by each entity.[24] However, allocating non-usable space costs according to number of entities (rather than number of attachments) will incent existing attachers to engage in speculative overlashing, since under this allocation method overlashings would not be allocated any non-usable pole costs. On the other hand, if the Commission allocates the cost of non-usable space equally among presumptive number of attachments, overlashings would be charged the same rate of attachment as original attachments, and the incentive to speculate will be eliminated.

[24] "We also propose that such costs will be apportioned equally to all such attaching entities." *Notice* at 11.

B. All Utilities that Provide Either Telecommunications or Cable Services Must Impute the Share of Pole Costs Occupied by its Telecommunications or Cable Attachments

In its Notice, the Commission notes that "§224(g) requires that a utility providing telecommunications services impute to its costs of providing service an amount equal to the rate for which such company would be liable under...[§224(e)]."[25] MCI notes that §224(g) also imposes the same requirements on a utility providing cable services.

C. All Attachments that Do Not Exclusively Provide Electric or Cable Services Must Be Counted When Determining the Allocation of Two-Thirds the Cost of Other-than-usable Pole Space

In its Notice, the Commission seeks comments on how to identify which attachments will be counted for purposes of allocating two thirds of the cost of other-than-usable pole space.[26] At one point the Commission gives the impression that cable operators providing cable service will be responsible for recovering a share of non-usable costs.[27] Yet, later in the same paragraph, the Commission recognizes that Congress intended to allocate two-thirds of the cost of non-usable pole space to companies with telecommunications attachments, but not cable attachments.[28]

Congress intended §224(e) to apply to all attachments providing telecommunications

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[25]*Notice* at 11.

[26]*Notice* at 11.

[27]"We propose, consistent with the statutory language, requiring equal apportionment of two-thirds of the costs of providing unusable space among all attaching entities, that any telecommunications carrier, or cable operator or LEC attaching to a pole be counted as a separate entity for the purposes of apportionment of two-thirds of the costs of the unusable space." *Notice* at 11.

[28]"...where a utility is providing telecommunications services, such entity would also be counted as an attaching entity for purposes of allocating the costs of unusable space under Section 224(e)."

services, and §224(d) to apply to attachments providing only cable services. Consequently, only attachments that provide telecommunications services should be counted for purposes of allocating two-thirds of non-usable space costs.[29] This means that attachments owned by cable operators will be subject to §224(e) rate treatment if the attachment provides a telecommunications service. Attachments owned by an electric utility, or its affiliate, will be subject to §224(e) rate treatment if any part of the attachment provides a telecommunications service.

Similarly each incumbent LEC attachment should be counted when determining the allocation of two-thirds of the non-usable costs. This does not mean that incumbent LECs should pay higher pole attachment rates than they are already paying. Because the pole attachment rates incumbent LECs and electric companies charge each other have been determined through negotiation of similarly based and similarly powerful companies, these rates are already recovering costs associated with non-usable space.[30]

By this same logic, attachments of government agencies should only be counted when the attachment provides a telecommunications service. Attachments that provide electric service, e.g. street lights or traffic signals, are located in the electric space, and are already recovered in the one-third allocation of non-usable space to electric services.

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[29]By implication, §224(e) requires one-third of the costs of non-usable pole space be allocated to attachments that exclusively provide an electric service.

[30]The competitive price of attachment would be equal to the incremental cost of attaching. This would recover the space associated with usable space, the rate available to cable companies. If electric and telephone companies each had one-half of available poles, and they attached to the others pole at incremental rates, they would effectively be sharing the cost of non-usable space equally. Therefore the attachment rates available to ILECs through joint use agreements already recover their share of non-usable pole space.

D. Congress' Preemptive Allocation of Two-thirds of Non-Usable Space to Telecommunications Purposes Requires the Commission to Allocate Two-Thirds of Usable Space to Telecommunications Purposes

MCI supports the Commission's desire to spread two thirds the costs of non-usable space as broadly as possible.[31] Unfortunately, Congress allocated two-thirds of the cost recovery associated with this space to telecommunications attachments. Telecommunications carriers should not complain about Congress' preemptive allocation of space between electric and telecommunications uses, since this same allocation of two-thirds space to telecommunications and one-third space to electric must also apply to usable space.

Thus, in order to comply with explicit space allocation decisions made by Congress, the Commission must develop a presumptive allocation of usable space among electric and non-electric purposes that matches the allocation of non-usable space. Under the existing presumptive pole height of 37.5 feet, and 13.5 feet of usable space, the Commission should determine that 4.5 feet of usable space (including the safety space) should be reserved for electric purposes, and 9 feet of usable space should be reserved for telecommunications purposes. Electric utilities finding this amount of space insufficient for electric purposes may of course increase pole height pursuant to §224(i).

E. Utilities Are Able to Establish an Average Number of Attachments Per Pole Without Performing a Survey

In its Notice, the Commission proposes that each utility use internal information to develop a presumptive average number of attachments per pole in order to allocate costs of non-

[31] *Notice* at 10.

usable space.[32] MCI believes utility company pole attachment agreements, and notifications required in those agreements, permit utility companies to readily estimate a reasonably accurate presumptive average number of attachments per pole. MCI supports the Commission's proposal that telecommunications carriers be provided the methodology and information by which a utility's presumptive average number of communications attachments was determined.[33] MCI also supports the ability of a utility to set different presumptive averages based on geography, age of plant, or other factors, provided the utility company is able to openly document the basis with for arriving at these different presumptions, and provides this information to parties seeking attachment in a timely manner that assists open negotiation.[34] Under these conditions, MCI does not see the need for a survey of pole attachments.

F. There is No Non-Usable Conduit Space

In its Notice, the Commission seeks comment on what portion of a conduit system should be allocated to non-usable space. The Commission tentatively concludes that maintenance ducts be considered non-usable.[35] The record in CS 97-98 clearly shows that maintenance ducts are usable space. In fact, the Commission's conduit formula explicitly accounted for maintenance ducts as usable space by reducing the average number of useable ducts by the number of

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[32]*Notice* at 11.

[33]*Ibid.*

[34]If the attaching party doubts the presumptive number of pole attachments, it may verify the calculation with the data provided by the pole owner, or it may perform its own survey of the poles to which it seeks attachment.

[35]*Notice* at 16.

maintenance ducts.[36] It makes no sense to simultaneously consider a duct to be usable for maintenance purposes (and recover its costs through usable attachment rates) but generally non-usable.

The Commission seems compelled to declare some conduit space non-usable in order to maintain a different conduit rate for cable and telecommunications attachments. However, there is no non-usable conduit space. The non-usable space on a pole consisted of ground clearance and the depth of underground placement. Because clearance from ground traffic is achieved by burying the entire conduit, and since the costs of burying conduit are located in FERC accounts 357, 366, 572.1, and 574.4, the conduit costs most akin to non-usable pole costs would actually be recovered through usable conduit rates.

V. The Commission's Existing Cable Attachment Formulae for Allocating Usable Space May, with Minor Modifications, Be Applied to Telecommunications Attachments

In this section MCI Incorporates the Evidence Contained in its Comments and Reply Comments in CS Docket 97-98 into this proceeding.

A. There Are No Technical Differences Between Cable and Telecommunications Attachments That Require Different Usable Space Presumptions

Cable service has traditionally been supplied over coaxial cable, although in recent years cable operators have begun replacing parts of their networks with fiber cable. Coaxial, copper, and fiber cable share the same vertical separation requirements in the NESC, and should therefore be treated the same for purposes of allocating usable space and determining presumptive pole

[36]Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, March 14, 1997, at 21.

space occupied by an attachment.[37]

MCI supports the Commission's proposal to allocate one foot of usable space to each original telecommunications attachment.[38] Under current rules, 13.5 feet is the existing amount of presumptive usable space on a 37.5 foot pole. As discussed above, because Congress has preemptively allocated two-thirds of non-usable space to telecommunications purposes; two-thirds of usable space or 9 feet, should be allocated to non electric purposes. This would yield one foot for cable and 8 feet for telecommunications. This amounts to a 38% increase in usable non-electric space, permitting an increase in presumptive number of non-electric attachments from 12 to 16. Table 2 shows the simultaneous effect of accounting for overlashing and the reallocation of usable space contemplated by Congress.

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[37]The only reason telecommunications attachments require different treatment for the allocation of non-usable space is because Congress required this separate treatment. Because Congress did not require the allocation of usable space among telecommunications attachments to be regulated differently from cable attachments, there is no reason different formulas for allocating usable space are required.

[38]As discussed above, the one foot allocation to cable attachments is more than required for vertical clearance requirements, and was implemented in order to distinguish cable from telecommunications attachments. With the proliferation of many diverse telecommunications attachments it will be necessary to devise means of identifying attachments other than by space separation.